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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN FRANCISCO

REBECCA CHAMORRO and PHYSICIANS FOR REPRODUCTIVE HEALTH,

Plaintiffs,

v.

DIGNITY HEALTH; DIGNITY HEALTH d/b/a MERCY MEDICAL CENTER REDDING,

Defendant.

Case No. CGC 15-549626

DEFENDANT DIGNITY HEALTH DBA MERCY MEDICAL CENTER REDDING'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEMURRERS TO FIRST AMENDED COMPLAINT

[Filed concurrently with: (1) Notice of Demurrers; (2) Demurrers; (3) Request for Judicial Notice; (4) Appendix to Request for Judicial Notice; (5) Notice of Payment for Court Reporter Fee]

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I. INTRODUCTION

This lawsuit seeks to force Mercy Medical Center Redding ("MMCR"), a Catholic hospital founded in 1907, to violate binding religious doctrine by authorizing prohibited surgical sterilization procedures. No court has ever imposed such a requirement on a Catholic hospital, and to do so in this case would violate MMCR's constitutional right to freedom of religion.

The procedures at issue are barred by the Ethical and Religious Directives for Catholic Health Care Services ("ERDs"), which are binding on the hospital and its medical staff. The law is unequivocal that a Catholic hospital may comply with such binding religious doctrine. *Taylor v. St. Vincent's Hosp.*, 523 F.2d 75, 77 (9th Cir. 1975) ("If the hospital's refusal to perform sterilization infringes upon any constitutionally cognizable right to privacy, such infringement is outweighed by the need to protect the freedom of religion of denominational hospitals 'with religious or moral scruples against sterilizations and abortions'") (citation omitted); *Watkins v. Mercy Med. Ctr.*, 364 F. Supp. 799, 803 (D. Idaho 1973) ("Mercy Medical Center has the right to adhere to its own religious beliefs and not be forced to make its facilities available for services which it finds repugnant . . ."), *aff'd*, 520 F.2d 894 (9th Cir. 1975); *Allen v. Sisters of St. Joseph,* 361 F. Supp. 1212, 1214 (N.D. Tex. 1973) (the public interest "in the establishment and operation of hospitals by religious organizations is paramount to any inconvenience that would result to the plaintiff in requiring her to either be moved or await a later date for her sterilization"), *appeal dismissed*, 490 F.2d 81 (5th Cir. 1974). There is no contrary authority.

Accordingly, MMCR's right to refuse to perform procedures barred by Catholic religious doctrine precludes the relief Plaintiffs seek. Plaintiffs' claims also all fail as a matter of law for additional reasons, including that Plaintiffs lack standing, the claims alleged do not constitute intentional discrimination under the Unruh Act or disparate impact discrimination under the Government Code, there is no private right of action under the statutes Plaintiffs cite, and MMCR did not violate any law.

II. SUMMARY OF FACTS

Dignity Health was founded in 1986 through the merger of Catholic hospitals. MMCR was established as Saint Caroline Hospital in 1907, and acquired by the Sisters of Mercy in 1944.[1]

MMCR's mission is to "further[] the healing ministry of Jesus"[2] and it is listed in the Official Catholic Directory ("OCD"), which reflects that MMCR is an official part of the Catholic Church. (Request for Judicial Notice ("RJN") Ex. 2.) *See Overall v. Ascension*, 23 F. Supp. 3d

[1] http://www.dignityhealth.org/mercy-redding/about-us.
[2] http://www.dignityhealth.org/mercy-redding/about-us/mission-vision-values.

816, 831 (E.D. Mich. 2014).[3] MMCR is bound to follow the ERDs, which are promulgated by the U.S. Conference of Catholic Bishops.[4] (FAC ¶¶ 48-50.) Similarly, Dignity Health's corporate Bylaws provide that Dignity Health's mission is to continue "a healing ministry based on the life and works of Jesus in the provision of healthcare services . . . ," that its Catholic hospitals must follow the ERDs, and that its officers may not facilitate procedures contrary to Catholic teaching. (RJN Ex. 4, Bylaws, ¶¶ 3.1, 3.3, 8.6(d), 8.10.)

The ERDs' purpose is to "'reaffirm the ethical standards of behavior in health care that flow from the Church's teachings about the dignity of the human person'" and "'to provide authoritative guidance on certain moral issues that face Catholic health care today.'" *Means,* 2015 WL 3970046, at *3. Directive 5 provides that "Catholic health care services *must adopt these Directives* as a policy, [and] *require adherence to them* within the institution as a condition for medical privileges and employment . . . ." (RJN Ex. 3 (emphasis added).)[5]

Directive 53 bars direct sterilization procedures. (FAC ¶ 49.) "Direct sterilization of *either men or women*, whether permanent or temporary, is not permitted . . . . Procedures that induce sterility are permitted when their direct effect is the cure or alleviation of a present and serious pathology and a simpler treatment is not available." (FAC ¶ 49 (quoting ERD 53 (emphasis added)).) Directive 70 prohibits cooperation with direct sterilization: "Catholic health care organizations are not permitted to engage in immediate material cooperation in actions that are intrinsically immoral, such as . . . direct sterilization." (RJN Ex. 3.)

MMCR's Sterilization Policy follows Dignity Health's Bylaws and the ERDs: MMCR's "Mission is accomplished in accordance with the teachings of the Roman Catholic Church . . ., and is specifically guided by the [ERDs]. . . . *Therefore, tubal ligation or other procedures that induce sterility for the purpose of contraception are not acceptable in Catholic moral teaching even when performed with the intent of avoiding further medical problems associated with a future pregnancy.*" (FAC ¶ 52 (quoting policy; emphasis added); RJN Ex. 6.) The Sterilization Policy references ERD 53, and clarifies that procedures that induce sterility are permitted *only*

[3] "An entity is listed in the [OCD] only if a bishop of the Roman Catholic Church determines the entity is 'operated, supervised, or controlled by or in connection with the Roman Catholic Church.' Courts view the [OCD] listing as a public declaration by the Roman Catholic Church that an organization is associated with the Church." *Overall*, 23 F. Supp. 3d at 831 (citation omitted).

[4] "Individual bishops exercise authority under Canon Law to bind all Catholic health care institutions located within their diocese to the ERDs as particular law within the diocese." *Means v. U.S. Conf. of Catholic Bishops,* 2015 WL 3970046, at *3 (W.D. Mich. June 30, 2015), *appeal pending*, No. 15-1779 (6th Cir.).

[5] As Plaintiffs' counsel has noted elsewhere, Catholic hospitals that refuse to adhere to the ERDs risk revocation of their Catholic status altogether. https://www.aclu.org/sites/default/files/field_document/growth-of-catholic-hospitals-2013.pdf, at p. 11 & n. 61; https://www.aclu.org/files/assets/2010-11-22-bishopletter1.pdf.

when "their direct effect is the cure or alleviation of a present and serious pathology and a simpler treatment is not available." (RJN Ex. 6.)

The governing documents of the independent Medical Staff of MMCR also require that the Medical Staff and its member physicians, including Plaintiff Chamorro's physician, Dr. Van Kirk, comply with the ERDs. The Medical Staff Bylaws state that "these Bylaws must conform to the [ERDs], as approved by the National Conference of Catholic Bishops." (RJN Ex. 5.)[6]

Chamorro previously sought to obtain a contraceptive tubal ligation at MMCR to be performed immediately after giving birth to her third child. (FAC ¶¶ 10, 13.) Chamorro was pregnant when she filed this action. She delivered her baby at MMCR on January 20, 2016, but did not receive the sterilization. (FAC ¶ 10.) Chamorro does not want more children, but has not decided what method of contraception to use. (FAC ¶ 11.) Plaintiff Physicians for Reproductive Health ("PRH") is an organization of "physicians who seek to ensure meaningful access to comprehensive reproductive health services as part of mainstream medical care." (FAC ¶ 15.)

III. ARGUMENT

A. A Court May Not Compel a Religious Hospital to Violate Religious Doctrine.

As Judge Goldsmith stated in denying a preliminary injunction, Plaintiffs "cited no authority, and there isn't any, allowing the Court to order a hospital to perform or be mandated to allow performing a procedure prohibited by a religious doctrine. It just doesn't exist." (RJN Ex. 8 (Tr. 15:8-11).) That is no accident. Plaintiffs' claims fail because the law is precisely to the contrary. The claims impermissibly interfere with the hospital's constitutional right to free exercise of religion and would require the Court to insert itself into church governance and affairs.

Plaintiffs' lawsuit ignores that courts uniformly recognize that private religious hospitals and physicians may not be forced to provide procedures contrary to their religious principles. *See Allen*, 361 F. Supp. at 1213-14 (plaintiff's desire for postpartum contraceptive tubal ligation did not create emergency or overriding interest justifying court intervention in the Catholic hospital's policies); *Conservatorship of Morrison,* 206 Cal.App.3d 304, 311 (1988) ("[N]o physician should be forced to act against his or her personal moral beliefs if the patient can be transferred to the care of another physician who will follow the [patient's] direction"); *Chrisman v. Sisters of St. Joseph of Peace*, 506 F.2d 308, 312 (9th Cir. 1974) ("'There is no constitutional objection to the decision by a purely private hospital that it will not permit its facilities to be used for the

[6] The Medical Staff's Rules & Regulations state "any procedure that results in sterilization must be performed according to Hospital policies and procedures" and the "actions of the medical staff and its members, within the facilities, departments and programs of the hospital, shall conform" to the ERDs. (RJN Ex. 7.)

performance of abortions'") (citation omitted); *see also* cases cited in Introduction.[7] Plaintiffs' claims fail in the face of this uniform case law.

1. The Relief Plaintiffs Seek Would Violate the State and Federal Constitutions.

The right to free exercise of religion is enshrined in the state and federal constitutions. Cal. Const., art. I, § 4 ; U.S. Const., 1st Am.; *People v. Woody,* 61 Cal.2d 716, 727 (1964) ("the right to free religious expression embodies a precious heritage of our history"). The California Supreme Court has applied strict scrutiny to state laws that burden a defendant's religious beliefs under the California Constitution. *Catholic Charities of Sacramento v. Sup. Ct.,* 32 Cal.4th 527, 562 (2004); *North Coast Women's Care Med. Grp. v. Sup. Court,* 44 Cal.4th 1145, 1158-59 (2008); *Smith v. FEHC*, 12 Cal.4th 1143, 1178 (1996). Under strict scrutiny, no law (or court order) can be applied "in a manner that substantially burden[s] a religious belief or practice unless the state show[s] that the law represent[s] the least restrictive means of achieving a compelling interest or, in other words, [is] narrowly tailored." *Catholic Charities,* 32 Cal.4th at 562.

Here, Plaintiffs seek to force MMCR to violate the ERDs. MMCR could not comply with such an order without forsaking its Catholic identity—the ultimate burden in a religious freedom case. Moreover, any such action would lead to enforcement of the ERDs by the local Catholic Bishop, who could formally withdraw MMCR's Catholic status and sanction the women religious who administer the hospital.

Plaintiffs have argued that *Catholic Charities* supports the relief they seek, but it is distinguishable. There, the Court held that a state law mandating that employer-sponsored prescription drug coverage include contraceptive products embodied a compelling state interest sufficient to override the burden on a faith-based employer of being forced to engage in conduct that violated its religious belief. Importantly, the Court held that the employer could easily *avoid* that burden by simply not offering prescription drug coverage at all. *See id.* Similarly, in *North Coast*, the Court held that a physician practice that included some physicians who had religious objections to providing fertility treatment to a lesbian couple could easily avoid any burden on religious belief by refusing "to perform the IUI medical procedure . . . for any patient of North Coast," or "ensur[ing] that every patient [receive the procedure] through a North Coast physician lacking defendants' religious objections." *North Coast,* 44 Cal.4th at 1159.

[7] Plaintiffs' focus on tubal ligation performed immediately after delivery, as opposed to some other time, as the "standard of care" (FAC ¶ 20), misses the point. The procedure is purely elective, and contraceptive tubal ligations are prohibited by the ERDs at MMCR regardless of when they take place.

Here, in contrast, MMCR cannot avoid the severe burden that would be placed on it by the relief Plaintiffs seek.[8] MMCR cannot comply with an order to violate the ERDs. As Justice Baxter explained, the *North Coast* Court might not have reached the same conclusion in "the case of a sole practitioner . . . who lacks the opportunity to ensure the patient's treatment by another member of the same establishment." *Id.* at 1162-63 (Baxter J. concurring).

Moreover, Plaintiffs cannot demonstrate any compelling state interest sufficient to override MMCR's constitutional religious freedoms. Even if their state-law claims did not all fail on their own terms, as discussed in Section III.B, below, the minimal alleged impact on the state's interest is far outweighed by MMCR's constitutional rights. *See Woody*, 61 Cal.2d at 727 (in such cases, "[t]he scale tips in favor of the constitutional protection").[9]

2. The Relief Plaintiffs Seek Would Impermissibly Involve the Court in Church Affairs and Matters of Church Governance.

The relief sought would also excessively entangle the Court in Catholic religious doctrine and impermissibly intrude on matters of church governance. *Means*, 2015 WL 3970046, at *12. In *Means*, the plaintiff claimed that the sponsors of a Catholic healthcare system acted negligently by adopting the ERDs as hospital policy. *Id.* at *3. Noting that the "application of the [ERDs]" is "inextricably intertwined with the Catholic Church's religious tenets," the court dismissed the action because the court would be required to interpret the ERDs to determine whether their application constituted negligence. *Id.* at *13. Here, Plaintiffs contend that MMCR discriminated and violated various laws *by* adhering to the ERDs. (FAC ¶¶ 44-75.) As in *Means*, to rule on such claims, the Court would be required to interpret and scrutinize the ERDs, for example, by

[8] The U.S. Supreme Court is now struggling with the question of whether it would violate the constitutional right to free exercise of religion to require a religiously affiliated non-profit to submit a form stating that it objects to providing insurance coverage for contraception to its employees. *See* March 29, 2016 Order in *Zubik v. Burwell*, U.S. Dkt. No. 14-1418. After oral argument, the Court took the extraordinary step of asking for briefing on whether there might be some mechanism to allow the employees to obtain contraceptive insurance benefits without requiring the religious employers even to submit a form. *Id.* That a bare form submission requirement has produced such gyrations to avoid burdening religion makes clear the obvious impropriety of Plaintiffs' claims, which would force a private Catholic hospital to facilitate the actual performance of religiously prohibited surgical procedures. Indeed, beyond the "hijacking" of the religious employers' insurance plans that concerns some members of the High Court, the commandeering of church property is even clearer here, where the Plaintiffs want the Court to force the hospital, its operating room, supplies, and nursing staff to perform prohibited surgical procedures.

[9] Plaintiffs have contended that rational basis review applies to a state statute that burdens *federal* constitutional rights. That claim is irrelevant to the analysis of Plaintiffs' claims under the California Constitution, which is far more rigorous and protective of religion. Cal. Const., art. I, § 24 ("Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution"); *North Coast*, 44 Cal.4th at 1158. Nor is Plaintiffs' claim correct as to the First Amendment because the holding in *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 878-79 (1990), applies to "individuals," not the Catholic Church and its apostolates. *See, e.g., EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 462 (D.C. Cir. 1996) ("It does not follow . . . that *Smith* stands for the proposition that a *church* may never be relieved from [] an obligation [to comply with a neutral law of general applicability]") (emphasis in original).

determining whether decisions to allow or disallow tubal ligations evidenced discriminatory intent and whether denial of the procedure was in fact required by the ERDs. In addition, the order sought by Plaintiffs would directly interfere with the highly structured church governance structure including the ERDs, which are enforced on MMCR by the Bishop of Sacramento.[10] *See* n.4, *supra*; *New v. Kroeger*, 167 Cal.App.4th 800, 815 (2008) ("Civil courts cannot interfere in disputes relating to religious doctrine, practice, faith, ecclesiastical rule, discipline, custom, law, or polity"); *Nally v. Grace Comm. Church*, 47 Cal.3d 278, 299 (1988) (refusing to impose a duty of care on pastors). Religious organizations are guaranteed "an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94, 116 (1952); *Catholic Univ.*, 83 F.3d at 463 ("the Free Exercise Clause guarantees a church's freedom to decide how it will govern itself, what it will teach, and to whom it will entrust its ministerial responsibilities . . .").

3. Conscience Clause Legislation Bars Plaintiffs' Claims.

Health care conscience clause legislation also bars Plaintiffs' claims. The provision of health care necessarily implicates the moral and religious values of health care providers. This is exemplified by the longstanding and widespread contribution of the Catholic Church and orders of women religious to the provision of health care. MMCR and Catholic hospitals in this country exist because congregations of women religious, such as the Sisters of Mercy who founded Dignity Health, carry out the healing ministry of Jesus by bringing health care to millions of people through the founding and administration of these hospitals. Indeed, in 2000, the American Medical Association House of Delegates reaffirmed its policy that "neither physician, hospital, nor hospital personnel shall be required to perform any act violative of personally held moral principles." American Medical Association's House of Delegates Policy H-420.959.

In light of the inescapable fact that religion plays a core role in the provision of health care, Congress recognized the need for deference to the "conscience rights" of religious hospitals to adhere to mandatory church doctrine. The Church Amendment provides that a hospital recipient of Hill-Burton funds for modernization of hospital facilities (such as MMCR) *cannot* be forced to "*make its facilities available for the performance of any sterilization* or abortion if the

[10] Indeed, Plaintiffs' counsel has asserted, in connection with this very case, that MMCR should be compelled to allow the procedure because it involves a medical decision between a woman and her doctor and "there's no room in that equation for bishops." https://www.aclunc.org/blog/can-government-funded-hospitals-serving-public-invoke-religious-directives-deny-basic. That is very clearly a plea for this Court to override binding directives of the Catholic Church that are interpreted and applied by the Bishop of Sacramento and observed at MMCR.

performance of such procedure or abortion in such facilities is prohibited by the entity on the basis of religious or moral convictions." 42 U.S.C. §300a-7(b) (emphasis added). As the Office for Civil Rights of the Department of Health and Human Services ("HHS") has explained, "the conscience provisions contained in . . . the 'Church Amendments[]' were enacted in the 1970s to *protect the conscience rights of individuals and entities that object to performing or assisting in the performance of abortion or sterilization procedures if doing so would be contrary to the provider's religious beliefs or moral convictions.*"[11] *See also* Robin Fretwell Wilson, The Erupting Clash Between Religion & the State Over Contraception, Sterilization & Abortion, 135 144 (Allen D. Hertzke ed., 2015) (the Church Amendment "provides an absolute, unqualified ground for objecting to assisting with an abortion or sterilization if it would be 'contrary to one's religious beliefs or moral convictions'"); *Chrisman,* 506 F.2d at 312 (in enacting the Church Amendment, "Congress quite properly sought to protect the freedom of religion of those with religious or moral scruples against sterilizations and abortions").[12]

HHS also recognized the importance of protecting religious health care providers in 2015, when it requested comments regarding proposed rules implementing nondiscrimination requirements under the Affordable Care Act. HHS expressly stated that it "wants to ensure that the rule has the proper scope and appropriately protects sincerely held religious beliefs to the extent that those beliefs conflict with provisions of the regulation."[13]

Likewise, the California Legislature and Attorney General have recognized the importance of protecting religious health care providers. The California Legislature has enacted statutes recognizing that religious healthcare providers may not be forced to perform procedures that violate religious principles. *See, e.g.,* Probate Code § 4734(b) ("A health care institution may decline to comply with an individual health care instruction or health care decision if [it] is contrary to a policy of the institution that is expressly based on reasons of conscience . . ."); Bus. & Prof. Code § 733(b)(3); Health & Saf. Code § 123420. Indeed, the legislative history of Health & Safety Code section 1258 (one of Plaintiffs' core claims) makes it clear that Section 1258 applies only to hospitals that, unlike MMCR, perform contraceptive sterilizations. (RJN Ex. 1

[11] http://www.hhs.gov/civil-rights/for-individuals/conscience-protections/factsheet/index.html (emphasis added).

[12] The ACLU itself agrees, and recently told the federal government repeatedly, that the Church Amendment and other "federal refusals laws . . . permit[] individuals and institutions to withhold essential healthcare . . . from patients." https://www.regulations.gov/#!docketDetail;D=HHS-OCR-2015-0006 (enter search for section "300a-7" for the 17 letters from various ACLU offices to HHS containing the quoted language).

[13] https://www.federalregister.gov/articles/2015/09/08/2015-22043/nondiscrimination-in-health-programs-and-activities. The ACLU letters to HHS referenced in footnote 12, agreeing that the Church Amendment protects hospitals, responded to this proposed regulation.

("The bill is limited to institutions that permit sterilizations for contraceptive purposes, so that it *would not affect hospitals and clinics which do not permit such operations as a matter of policy*") (emphasis added). California's Attorney General also has recognized that "private hospitals can refuse to perform sterilizations, as well as abortions, in their facilities."[14]

This case, while seeking unprecedented and extraordinarily intrusive relief, does not tread new ground. There is universal agreement among courts, legislators, and regulators that the conscience rights of health care providers must be respected. [15]

B. Plaintiffs' Claims Fail for Numerous Separate and Additional Reasons.

Plaintiffs' claims all fail *as a matter of law* for the following independent reasons.

1. PRH Lacks Standing to Bring Any of the Claims.

An association that sues on its own behalf is subject to the same standing requirements as any other plaintiff: it must "possess[] the right sued upon by reason of the substantive law." *Redevelopment Agency of City of San Diego v. San Diego Gas & Elec.*, 111 Cal.App.4th 912, 920-21 (2003). "The prerequisites for standing to assert statutorily-based causes of action are to be determined from the statutory language, as well as the underlying legislative intent and the purpose of the statute." *Surrey v. TrueBeginnings*, 168 Cal.App.4th 414, 445 (2008).

PRH lacks standing under the Unruh Act because it cannot allege that it is the victim of any alleged discrimination. *Midpeninsula Citizens for Fair Housing v. Westwood Investors*, 221 Cal.App.3d 1377, 1383 (1990) (organization lacked standing under the Unruh Act, which was "intended to provide recourse for those individuals actually denied full and equal treatment by a business establishment"); *see also Angelucci v. Century Supper Club*, 41 Cal.4th 160, 175 (2007) ("a plaintiff . . . must actually suffer the discriminatory conduct"). For the same reason, PRH lacks standing to sue under Government Code section 11135. *See Blumhorst v. Jewish Family Services of L.A.*, 126 Cal.App.4th 993, 1001-03 (2005) ("The right to sue for a violation of section 11135 exists in injured victims of unlawful discrimination").

[14] http://oag.ca.gov/publications/womansrights/ch5#5_2.

[15] The ACLU also has conceded that it is inappropriate to require the provision of certain procedures where doing so would "compel devout Catholics to engage in behavior . . . in violation of their Faith." *See* ACLU Amicus Brief in *Benitez v. North Coast Women's Care Medical Group,* Cal. S.Ct. No. S142892 (Apr. 2, 2007), p. 2; ACLU Amicus Brief in *Catholic Charities of Sacramento v. Sup. Ct.,* Cal. S.Ct. No. S009982 (Jan. 18, 2001) p. 37. https://www.aclu.org/legal-document/aclu-amicus-brief-catholic-charities-sacramento-v-superior-court-sacramento-county. Similarly, in arguing for the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb, the ACLU stated that "RFRA was plainly intended to protect religious organizations like Petitioners here from being forced to participate in the provision of healthcare benefits that conflict with their religious beliefs." Nadine Strossen, then president of the ACLU, testified in support of RFRA, noting that the statute safeguarded "such familiar practices" as "*permitting religiously sponsored hospitals to decline to provide abortion or contraception services.*" The Religious Freedom Restoration Act: Hearing on S. 2969 Before the S. Comm. on the Judiciary, 102d Cong. 192 (1992) (Prepared Statement of Nadine Strossen, pp. 80-81 (emphasis added)), https://www.justice.gov/sites/default/files/jmd/legacy/2014/07/13/hear-99-1992.pdf.

PRH also lacks UCL standing because PRH has not shown the requisite economic injury resulting from MMCR's reliance on the ERDs.[16] PRH's vague allegations are insufficient. *Turlock Irr. Dist. v. FERC*, 786 F.3d 18, 24 (D.C. Cir. 2015) (an organization must allege more than that it spent funds on advocacy; it must allege that "the defendant's conduct 'perceptibly impaired' the organization's ability to provide services in order to establish injury in fact").

2. Chamorro Lacks Standing and Her Claims Are Moot.

Chamorro is not pregnant, and so she is not seeking or eligible for a postpartum tubal ligation. She alleges she intends never to be pregnant again. She lacks standing, and her claims are moot. Chamorro lacks standing because she is not subject to or impacted by MMCR's Sterilization Policy. No change to that policy or declaration of the parties' rights could have any impact on her. A declaratory judgment cannot issue where there is no present controversy between the parties. *Connerly v. Schwarzenegger*, 146 Cal.App.4th 739, 747 (2007).

Chamorro also lacks standing under the UCL because she has not alleged that she has lost money or property as a result of MMCR's actions. She alleges only that she intends *someday* to spend money on alternative contraceptive methods. (FAC ¶ 14.)[17] The UCL requires a loss that has already occurred, not a speculative loss that the plaintiff may incur in the future. "Proposition 64 requires that a plaintiff have 'lost money or property' to have standing to sue." *Kwikset*, 51 Cal.4th at 323. A plaintiff must have standing at the time the suit is filed, and cannot acquire standing later during the suit.[18] Moreover, any alleged expenditure on contraception cannot viably be alleged to *result* from MMCR's adherence to the ERDs and MMCR policy. MMCR's Sterilization Policy predated Chamorro's request for the procedure, and her physician was fully aware that in most cases the procedure is denied.[19]

Chamorro's claims also are moot. The controversy that existed at the time she filed the complaint, when she was pregnant and seeking a postpartum tubal ligation that MMCR did not

[16] *See Kwikset Corp. v. Superior Court*, 51 Cal.4th 310, 323 (2011).

[17] Chamorro concedes that she suffered no economic damage, by seeking only nominal damages under Civil Code section 3360, which states that "[w]hen a breach of duty has caused no appreciable detriment to the party affected, he may yet recover nominal damages." Of course, this statute is merely a remedy that depends on a viable cause of action, which is lacking here.

[18] *Californians For Disability Rights v. Mervyn's, LLC*, 39 Cal.4th 223, 232-33 (2006) ("standing must exist at all times until judgment is entered and not just on the date the complaint is filed"); *Coral Const., Inc. v. City & Cty. of San Francisco*, 116 Cal.App.4th 6, 12 (2004).

[19] Even if Plaintiffs had standing to sue MMCR, they would not have standing to bring claims related to other Dignity Health hospitals in California. Plaintiffs do not allege facts demonstrating a relationship with any other Dignity Health hospital, all of which are separately licensed and have different Medicare provider numbers. https://data.medicare.gov/Hospital-Compare/Hospital-General-Information/xubh-q36u; http://gis.oshpd.ca.gov/atlas/places/list-of-hospitals. Alleged acts or omissions by separate hospitals besides MMCR do not create standing in either of the Plaintiffs. And Plaintiffs can no longer bring an action as self-appointed private attorneys general seeking to vindicate the rights of third parties allegedly impacted by UCL violations. *See Mervyn's*, 39 Cal.4th 223.

authorize, no longer exists. As such, she has no claim for this Court to adjudicate. *See Allen v. Sisters of St. Joseph*, 490 F.2d 81, 82 (5th Cir. 1974) (dismissing as moot a challenge to a hospital's refusal to provide tubal ligations brought by a woman who had already been sterilized elsewhere); *Chrisman*, 506 F.2d at 314-15 (same).

3. The Unruh Act Claim Fails as a Matter of Law.

The FAC fails to allege a violation of the Unruh Act, Civil Code § 51(b). First, by its plain terms, the Unruh Act does *not* apply to facially neutral policies such as MMCR's Sterilization Policy, which bars contraceptive sterilization as to all people, men or women. *See* Civ. Code § 51(c) ("This section shall not be construed to confer any right or privilege on a person that is . . . applicable alike to persons of every sex . . . [or] medical condition . . . ."); *Turner v. Ass'n of Am. Med. Colls.*, 167 Cal.App.4th 1401, 1408 (2008) ("A policy that is neutral on its face is *not actionable* under the Unruh Act, even when it has a disproportionate impact on a protected class") (emphasis added); *North Coast,* 44 Cal.4th at 1159 (Act does not apply to policy applicable to all patients).

Second, Plaintiffs allege that MMCR *does* allow the performance of postpartum tubal ligations on some pregnant women. (FAC ¶¶ 53-61.) This negates their core contention that MMCR discriminates against women or even pregnant women.[20] A defendant does not discriminate against a protected group when it provides the service to others in the same group.

Third, the Unruh Act prohibits only "*intentional* acts of discrimination." *Harris v. Capital Growth Investors XIV*, 52 Cal.3d 1142, 1172 (1991) (emphasis in original); *Koebke v. Bernardo Heights Country Club,* 36 Cal.4th 824, 853 (2005). Plaintiffs' allegations that MMCR was "knowingly denying female patients access to pregnancy-related care" do not suffice. (FAC ¶¶ 65-66.) *See Greater L.A. Agency on Deafness v. Cable News Network, Inc.*, 742 F.3d 414, 427 (9th Cir. 2014) (rejecting argument that CNN violated the Unruh Act by acting with deliberate indifference to the *known* impact on hearing-impaired persons of its practice of not making closed-captioning available for on-line videos). In the absence of an allegation that the ERDs or Sterilization Policy were adopted *for the purpose of accomplishing discrimination* or as a *disguised device to accomplish discrimination*, MMCR's conduct cannot violate the Unruh Act. *See Koebke*, 36 Cal.4th at 854. Moreover, MMCR's adherence to the ERDs is the very antithesis of discrimination. MMCR, as a Catholic hospital, treats all of its ministry's patients with respect and compassion. The Church articulated this requirement at the Second Vatican Council in 1965,

[20] In fact, Plaintiffs' separate claim under Health & Saf. Code § 1258 alleges that MMCR violates that law by allowing the procedure as to some pregnant women but not others.

stating: "with respect to the fundamental rights of the person, *every type of discrimination*, whether social or cultural, whether based on sex, race, color, social condition, language or religion, is to be overcome and eradicated as contrary to God's intent."[21] And ERD 23 provides that "[t]he inherent dignity of the human person must be respected and protected regardless of the nature of the person's health problem or social status. The respect for human dignity extends to *all persons who are served by Catholic health care*." (RJN Ex. 3 (emphasis added).)

Finally, the Unruh Act does not apply to allegedly unequal treatment regarding the provision of contraceptive procedures. For purposes of the Unruh Act's ban on sex discrimination, "'[s]ex' includes, but is not limited to, pregnancy, childbirth, or medical conditions related to pregnancy or childbirth." Civ. Code § 51(e)(5). But contraceptive surgical procedures do not fall within these categories. *See Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 679 (8th Cir. 1996) (Pregnancy Discrimination Act inapplicable because "[p]regnancy and childbirth which occur after conception, are strikingly different from infertility, *which prevents conception*") (emphasis added); *In re Union Pacific Railroad Employment Practices Litigation*, 479 F.3d 936, 942 (8th Cir. 2007) (same); *Williams v. MacFrugal's Bargains Close Outs, Inc.*, 67 Cal.App.4th 479, 484 (1998) (hysterectomy not related to pregnancy; the antidiscrimination laws "share one common goal: 'to end discrimination against pregnant workers,' *not to stop pregnancy*") (citations omitted; emphasis added). Procedures that prevent a woman from becoming pregnant are not related to pregnancy.[22]

4. The Claim for Violation of Government Code Section 11135 Fails as a Matter of Law.

Plaintiffs cannot state a claim under Government Code section 11135. This law applies to discrimination based on sex or certain other characteristics with respect to "any program or activity . . . funded directly by the state, or receiv[ing] any financial assistance from the state." Gov't Code § 11135; *see also* Cal. Code Regs., tit. 22, § 98010 (defining "program or activity" as "any project, action or procedure" relating to the *provision* of various services).[23]

First, Plaintiffs have not alleged disparate impact discrimination on women or pregnant women. Such a claim requires a plaintiff to plead and prove that a facially neutral practice causes a disproportionate adverse impact *on a protected class*. Plaintiffs' claim is conceptually flawed,

[21] http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_cons_19651207_gaudium-et-spes_en.html (Vatican Council II, Pastoral Constitution of the Church in the Modern World, n. 29 (emphasis added)).

[22] Plaintiffs themselves also assert that "[t]ubal ligation is never . . . performed to reduce any complications or medical risks associated with a person's labor and delivery." (FAC ¶ 23.)

[23] Claims under section 11135 are comparable to claims for violation of federal Title VI and subject to disparate impact analysis. *Darensburg v. Metropolitan Transp. Comm.*, 636 F.3d 511, 519 (9th Cir. 2011).

because they have not alleged that MMCR's policy has a disparate impact on a *protected group*, such as all women patients at MMCR or all pregnant women at MMCR. An allegation that the group adversely impacted by a defendant's practice *includes* women or pregnant women, or even is composed solely of women or pregnant women, is insufficient to allege a disparate impact on a protected group. *Carter v. CB Richard Ellis, Inc.*, 122 Cal.App.4th 1313, 1321-23 (2004) (rejecting disparate impact theory where employer decision adversely impacted administrative managers, who were mostly women over 40; "Women were not affected as a group. Persons over 40 were not affected as a group. Rather, administrative managers were affected as a group. . . . And the law does not prohibit discrimination against administrative managers."). Plaintiffs do not and cannot allege that MMCR's Sterilization Policy has a statistically significant impact on a protected group. Therefore, Plaintiffs' claim necessarily fails.

Second, Plaintiffs have not identified a specific "program or activity" in which the alleged discrimination occurred, much less a program funded by the State. Plaintiffs generally allege that Dignity Health receives funding from the state by way of "government grants," "Medicare and Medicaid payments," and "meaningful use incentives." (FAC ¶ 19.) They also assert that MMCR received funds in 2006 and 2012 (years *before* the denial of Chamorro's request) from a state agency "for its family practice residency training program, which provides funds for training in MMCR's labor and delivery ward." (*Id.*) These allegations are insufficient. A general allegation of state funding does not state a claim for violation of this "program-specific" statute. *Communidad en Accion v. Los Angeles City Council*, 219 Cal.App.4th 1116, 1128-29 (2013) (city's entire waste management program was not a "program or activity" receiving state funding so as to render one siting decision in violation of the statute); *People v. Levinson*, 155 Cal.App.3d Supp. 13, 19 (1984) (court's discretionary power to refer offenders to traffic school was not a "program or activity" receiving state funding); *Grove City College v. Bell*, 465 U.S. 555, 571 (1984) (under Title IX, discrimination focuses on the particular program for which the government funds are received, not the entire institution; "Most federal educational assistance has economic ripple effects throughout the aided institution, and it would be difficult, if not impossible, to determine which programs or activities derive such indirect benefit."); *Johnson v. County of Nassau*, 411 F. Supp. 2d 171, 175-76 (E.D. N.Y. 2006) (no claim for discrimination stated under Title VI where government funding was unrelated to employment).

While Plaintiffs stretch to tie the denial of contraceptive procedures to money allegedly received for MMCR's "family practice residency training program," that program, by statute, is

intended specifically to increase the number of competent family practice physicians and nurses in underserved areas; it has nothing to do with contraceptive procedures or even the services that are or are not provided generally in hospitals. Health & Saf. Code § 128200 *et seq.*

Finally, a defendant may rebut a showing of disparate impact by justifying the challenged practice. *Darensburg*, 636 F.3d at 519. MMCR's Sterilization Policy is justified because MMCR must follow the ERDs. Plaintiffs have not alleged, and cannot allege, that MMCR has any alternative and the FAC admits this is a frontal attack on the ERDs.

5. The Claims for Violating the Corporate Practice of Medicine Statutes Fail as a Matter of Law.

Plaintiffs' claims for violation of Bus. & Prof. Code §§ 2032, 2052, and 2400 fail because those statutes do not provide a private right of action, as Judge Goldsmith specifically ruled. A statute confers a private right of action *only* if "the Legislature has 'manifested an intent to create a private cause of action' under the statute. . . . Such legislative intent, if any, is revealed through the language of the statute and its legislative history." *Lu v. Hawaiian Gardens Casino*, 50 Cal.4th 592, 600 (2010) (quoting *Moradi-Shalal v. Fireman's Fund Ins.*, 46 Cal.3d 287, 305 (1988)). The Legislature has authorized only public, not private, enforcement of these statutes. Bus. & Prof. Code §§ 2220, 2052 (violation enforceable by the Medical Board and is a public offense punishable by fine and/or imprisonment). Judge Goldsmith explained there is "clearly not a private right of action here. That isn't even debatable." (RJN Ex. 8 (Tr. at 20:17-20).)

Nor did Plaintiffs allege a violation of these laws. The ban on the corporate practice of medicine is not implicated by a hospital's observance of a mandated doctrinal rule against providing ethically prohibited medical services. This is the practice of religion, not the practice of medicine. Further, Plaintiffs' corporate practice of medicine claim is based on the demonstrably false assumption that *physicians* decide what procedures are performed at a hospital. Physicians decide what procedures are medically appropriate for their patients. That is the practice of medicine. Hospitals decide what services are offered or not. And a hospital decides what services are offered for a variety of reasons, including legal requirements,[24] funding, staffing, volume of procedures, availability of necessary equipment and facilities, and other reasons—including religious rules that prohibit some procedures. A hospital's determination of what procedures to offer based on such factors is hospital administration, not the practice of medicine.[25] The

[24] *See* Cal. Code Regs., tit. 22, § 70005(a) (listing the eight basic services that a general acute care hospital must provide).

[25] The hospital's governing body, not the medical staff, has ultimate responsibility and authority for what happens inside the hospital. *El-Attar v. Hollywood Presbyterian Med. Ctr.*, 56 Cal. 4th 976, 993 (2013)

availability of particular procedures at a given hospital, or lack thereof, is one reason physicians often have privileges at multiple hospitals and sometime must send patients to another facility.

Likewise, the ban on the corporate practice of medicine is intended "to protect the professional independence of physicians and to avoid the divided loyalty inherent in the relationship of a physician employee to a lay employer." *Cal. Medical Ass'n v. Regents of Univ. of Cal.*, 79 Cal.App.4th 542, 551 (2000). MMCR is not alleged to (and does not) employ Dr. Van Kirk or exert any control over his medical decisions, nor has MMCR questioned or challenged Dr. Van Kirk's alleged conclusion that the procedure was the medically appropriate choice for Chamorro. *See Epic Med. Mgm't v. Paquette*, 244 Cal.App.4th 504, 517-18 (2015) (rejecting corporate practice of medicine claim). There is also no allegation that MMCR profits by its adherence to the ERDs or that it collects professional fees from non-physicians for physicians' services, the other common fact pattern posing a corporate practice of medicine problem. *See, e.g.*, 92 Ops. Cal. Atty. Gen. 56 n.1 (Sept. 24, 2009) (unlicensed entity could not perform "professional radiology services" or "charg[e] and collect[] fees for such services"). Moreover, MMCR is not even obligated to provide obstetric services at all, as they are not among the procedures a hospital must provide.[26] *See* Cal. Code Regs., tit. 22, § 70005(a). Thus, it cannot be "practicing medicine" when the hospital simply *declines* to offer a particular service.

6. The Claim for Violation of Section 1258 Fails as a Matter of Law.

Plaintiffs' claim for violation of Health & Safety Code section 1258 also fails because, as Judge Goldsmith recognized, there is no private right of action. The Legislature provided only for government enforcement. *See* Health & Saf. Code §§ 1290, 1293 (violations of § 1258 punishable as misdemeanors prosecuted by the district attorney); Cal. Code Regs., tit. 22, § 70135(a) (Department may suspend license of hospital that violates section 1258). No private right of action exists because section 1258 falls squarely within the regulatory authority and expertise of state and federal regulators, who are fully aware that MMCR (and other Catholic hospitals) do not perform contraceptive sterilizations, but have *never* forced Catholic hospitals to perform these procedures or penalized them for failing to do so.[27]

("[T]he governing board's role reflects the fact that the hospital itself is ultimately responsible for the health and safety of the patients it serves."); *Alexander v. Sup. Ct.*, 5 Cal. 4th 1218, 1224 (1993) (same); Joint Commission Leadership Standard LD.01.03.01 (same).

[26] For example, another Redding hospital, Shasta Regional Medical Center, does not provide obstetrical services. http://www.shastaregional.com/Services.aspx.

[27] Plaintiffs cannot allege that any federal or state survey agency, including HHS or the California Department of Public Health, has ever sought to compel MMCR to provide procedures barred by the ERDs. Nor has HHS's Office of Civil Rights alleged discrimination by MMCR relating to such denials. As noted, HHS is of the view that the Church Amendment provides conscience protection for hospitals, like MMCR, that adhere to religious directives and do not provide contraceptive sterilization.

Plaintiffs have no claim under this law even if they were authorized to sue. Section 1258 prohibits a hospital from placing nonmedical qualifications on an "*individual*," such as requirements regarding "age, marital status, and number of natural children"—a legislative effort to prevent a "paternalistic" approach to limiting tubal ligation for young, unmarried, and childless women.[28] (RJN Ex. 1.) MMCR's policy places no "qualifications" on any individual. Rather, it imposes an *institution-wide* rule that prohibits direct sterilizations unless a particular woman's exigent *medical* circumstances meet the exacting terms of the Sterilization Policy and the ERDs. As Judge Goldsmith noted, MMCR was "not placing restrictions or qualifications on the individual. It's not a qualification because it applies to everybody." (RJN Ex. 8 (Tr. 12:14-16).)

7. Plaintiffs' UCL Claim Fails as a Matter of Law.

Finally, the UCL claim also fails for several reasons. As discussed above, neither PRH nor Chamorro has standing to bring this claim, as neither has suffered economic loss as a result of MMCR's adherence to the ERDs. *Kwikset*, 51 Cal.4th at 323. Even if they had, the UCL claim still fails. Plaintiffs allege "Dignity Health is in violation of several provisions of California statutory law, and it is therefore also in violation of California's Unfair Competition Law." (FAC ¶ 90.) But as explained above, MMCR has not violated any of the laws on which Plaintiffs rely: Bus. & Prof. Code §§ 2032, 2052, and 2400 or Health & Saf. Code § 1258. A plaintiff cannot pursue a UCL claim based on a borrowed law when it cannot establish a violation of that underlying law. *See Morrison v. Viacom, Inc.*, 66 Cal.App.4th 534, 539 n.1 (1998).

IV. CONCLUSION

There is no legal basis for the Court to force MMCR to violate its religious faith and provide prohibited surgical sterilizations. The law protects MMCR from such an assault on its constitutional rights. Accordingly, for the reasons discussed above, the FAC should be dismissed with prejudice.

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[28] http://www.chicagotribune.com/lifestyles/health/ct-met-sterilization-denied-20140513-story.html.